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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1617

ROBERT A. SCHMITZ, *Petitioner,*

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A. also known as INTERNATIONALE INDUSTRIE UND HANDELSBETEILIGUNGEN, A.G., *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether the District Court judge abused his discretion when he denied petitioner's motion for reconsideration or to open the judgment to take additional testimony as to the reasonable value of his services when petitioner elected not to present such evidence at the trial.

COUNTERSTATEMENT OF THE CASE

The trial judge stated in his opinion [1] that the case was tried in such a manner that relief would be proper under any of three theories:

1. Express contract; or
2. Implied contract to pay a reasonable compensation; or
3. Relief in quasi-contract to prevent unjust enrichment of the defendant.[2]

The case was tried principally upon the claim of an express contract to pay petitioner a finder's fee equal to five percent (5%) of the recovery for the sole and single service of procuring the willingness of Mr. Charles E. Wilson to act as negotiator for respondent with the American Government.[3] The petitioner does not complain about the action of the lower courts in denying him any relief under this theory, the trial judge having stated that "it strains credulity to be-

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[1] This opinion, which serves as the court's Findings of Fact and Conclusions of Law, is printed in an appendix to the petition, the pages being numbered 19-34. References to this opinion in the brief will be cited as Op. —. Citations to "J.A." have reference to the joint appendix filed in the Court of Appeals which respondent has designated for transmission to this Court.

[2] The trial judge treated theories two (2) and three (3) as leading to the same result, and dealt with them jointly, stating at Op., p. 32:

> "While there are technical differences between the implied contract measure of damages and the quasi-contract measure, in suits for compensation, these different formula produce the same results. [Citing "Cf. Costigan, Implied-in-Fact Contracts, 88 Harv. L. Rev. 376, 383 (1920)"] The employer is required to pay compensation equal to the reasonable value of the services rendered."

[3] While testifying at the trial, Mr. Charles Wilson rejected out of hand the idea that petitioner's fee was tied merely to procuring him to undertake the task (R. 60, pp. 1223-4; J.A. 980-1).

lieve that such a large commission was offered to do so little." (Op., p. 29).

In both lower courts, petitioner urged the alternative remedies, but at no time did he claim any sum thereunder other than five percent (5%) of $121,000,000 (the net amount payable to respondent) or of $145,000,000 (the gross amount subject to deductions for taxes, etc.).

The petitioner seeks review solely of the lower court's action upon his post-trial Motion for Reconsideration or, Alternatively, to Open the Judgment and Take Additional Testimony. In order to give the Court a full picture of the proceedings upon this motion, respondent has printed as an appendix to this brief the entire related record, including the motion, supporting and opposing memoranda and the transcript of oral argument before the trial judge.

Petitioner states at page 2 of his petition, under the title of "Opinions", that no opinion was delivered by the trial judge in denying his motion. The judge did file an order of denial (p. 42a, Appendix, this brief) which sheds light upon his reasoning. The pertinent paragraph reads:

> "After thorough consideration of plaintiff's Points and Authorities, and after oral argument, the court is of the opinion that plaintiff has failed to demonstrate either manifest error of fact or law or to establish any other facts which entitle plaintiff to a complete or partial new trial.[4]

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[4] In footnote 1 on page 1 of the petition, and in the last sentence on page 13, it is suggested that the Judgment of Affirmance of the Court of Appeals does not mention the trial judge's order of denial of these motions. Respondent submits that the citation in the Order of Affirmance of "6A J. Moore, Federal Practice ¶ 59.07 (1971)" does just that; moreover, since this point was briefed and argued by both parties in the Court of Appeals, it is clear that the affirmance related to all actions taken by the trial judge.

Respondent agrees with petitioner that "the basic facts in the case, as found by the court, are stated in the opinion of" the trial judge (Pet. p. 5). Therefore, a reading of that opinion is sufficient to provide a clear picture of the case. However, the petition's fact statement departs from the opinion and findings of the trial court and includes assertions which are either not consistent with those findings or are irrelevant to the case in its present posture.

To understand this criticism by respondent, focus must be directed at the contention of petitioner, namely, that he earned between six and seven million dollars for services rendered to respondent from 1958 to 1960 solely in procuring Mr. Charles Wilson to act as negotiator. (See first sentence of first full paragraph on page 5 of petition.)[5] This is reinforced by petitioner at page 8 by the following:

> "* * * from the end of November 1958 until May 23, 1960, when Mr. Wilson accepted the trust powers—a period of 18 months—petitioner devoted all of his time, attention and his own money re-

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[5] This sentence should not be read as stating that settling the dispute was a condition to earning his compensation. The word "settle" is actually used in the infinitive mood and thus should be read with the word "to" in front of it. See the second paragraph of the trial court's Opinion under the title "Express Contract" (Op., pp. 26-27) which reads as follows:

> "As heretofore stated, plaintiff claims that, on October 26, 1969, Dr. Schaefer, the chief Director of Interhandel, orally promised him 5% of the value of any proceeds Interhandel might obtain in a settlement with the United States Government on condition that the plaintiff procure the services of Mr. Charles E. Wilson as trustee for Interhandel. *Plaintiff claims he had a vested right to the 5% commission at the moment Charles E. Wilson accepted the trusteeship in May, 1960, regardless of the means by which a settlement was accomplished,* but that actual payment would of necessity be delayed until the settlement fund actually became available." (Italics supplied)

sources, as well as much travel, to bring about the desired result."

On the other hand, the trial judge correctly understood the period in question to be from October 1959 to May 1960. This was due to the fact that until April 1959, petitioner was dealing with Dr. Sturzenegger as the leader of a stockholders' group (R. 55, p. 85). During this period Dr. Sturzenegger was not acting as an agent for respondent nor did petitioner have dealings "with other agents of respondent" (see first two lines of first full paragraph on page 8 of the petition). Dr. Sturzenegger resigned from any official connection with respondent in early 1958 (R. 54, pp. 21-2; R. 55, pp. 85, 94-5; R. 58, pp. 561-2, 573-4; R. 61, pp. 1044-5; R. 64, pp. 1276-9). Dr. Sturzenegger wrote petitioner on September 22, 1958 (R. 58, pp. 561-2) that he had resigned from the board of directors of respondent and "I have no influence on the destiny of the company and the resolution of the GAF problem being strived (sic) for for many years." (See Op., p. 22). Also, during part of this period, respondent was a paid representative of Food Machinery Company with regard to its acquiring respondent's stock interest in GAF (R. 55, pp. 79-80; R. 57, pp. 501-3; Pl. Ex. 9; R. 76: 79, 81). As late as April 23, 1959, petitioner wrote Dr. Sturzenegger a letter in which he acknowledged he had no mandate to act on behalf of either Dr. Sturzenegger or respondent (Deft. Ex. 54; R. 63: 1206, 1206; Pl. Ex. 18; R. 55; 116, 116). The evidence shows that because of respondent's activities with another interested American group (Pl. Ex. 21; R. 55: 127, 128; Pl. Ex. 21(a); R. 55: 127, 128 nothing relevant to this petition occurred after this until petitioner's meeting with Dr. Schaefer in October, 1959. This "hiatus" was noted by the trial judge (Op., p. 23). Therefore, the period in issue was October 29, 1959 through May 23, 1960.

The quotation from the trial court's opinion at the top of page 18 of the petition is taken out of context. A reading of the related text of the opinion demonstrates this, as well as showing how little work petitioner had to do between October 1959 and May 1960. The following is the text to which respondent refers:

> "The idea of a trusteeship had been broached to Mr. Charles E. Wilson at least ten months prior to plaintiff's October, 1959 meeting with Dr. Schaefer. It is true that Mr. Wilson had not accepted the trusteeship in October, 1959, yet he had been considering it for some time. He insisted on being convinced of the validity of the Swiss claim. This plaintiff attempted to do. Plaintiff gave extensively of his time and energies. He spent many hours providing background information on the entire Interhandel controversy and the various Swiss personalities involved.
>
> "Mr. Wilson also made it clear that he would not act for the Swiss unless his own government gave at least tacit approval.
>
> "All of this had transpired prior to plaintiff's October, 1959 meeting. While it cannot be said that Mr. Wilson was totally committed to accepting the trusteeship in October, 1959, it also cannot be said that the idea was totally foreign to him. *In other words, after October, 1959, it is highly questionable whether plaintiff had to do much convincing of Mr. Charles E. Wilson.*" (Italics supplied)[6]

In the paragraph on page 8 of the petition where petitioner fixes the period of time to be "from the end of November 1958 until May 23, 1960" he includes the following sentence":

> "In confirmation that petitioner was acting for respondent as its authorized agent in these nego-

[6] Mr. Charles Wilson commenced advocating the justice of respondent's cause as early as 1957. (R. 61, pp. 1046-7)

tiations, respondent, in May of 1960, reimbursed petitioner $13,733 for out-of-pocket expenses previously incurred."

Obviously the reader would infer that these expenses went back to November, 1958. On the contrary, Deft. Exhibit 50 (R. 62, 1147, 1148) is petitioner's bill for this sum, dated May 4, 1960 and is entitled "Expenses and Disbursements incurred during seven months from approximately October 1, 1959 up to May 1, 1960."[7]

Petitioner's references to the efforts of Mr. Charles Wilson and Mr. Wilson's attorney to settle the case, the interruption of these efforts by Dr. Schaefer of Union Bank, and the alleged violation of the "irrevocable" authority to Mr. Wilson to act for respond-

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[7] "May 4, 1960

"Interhandel A.G.—Union Bank of Switzerland—Dr.

To

"Robert A. Schmitz

"Expenses and disbursements incurred during seven months from approximately October 1, 1959, up to May 1, 1960 $13,733.00

"Kindly have an account set up with your Bank in my name to cover this amount, and immediately forward a cabled draft of $10,000.00, care of Mrs. Marion B. Schmitz, Special Account, Fairfield County Trust Company, Greenwich, Connecticut, whom I desire to act as my agent to collect said draft.

"Perhaps, in the absence of Dr. Schaefer, your Bank may wish to handle this matter through Mr. Bruno M. Saager, Deputy General Manager.

Very truly yours,

Robert A. Schmitz"

ent—which was denied by respondent at the trial,[8] are not only irrelevant to petitioner's reasons for granting certiorari, but are contradicted by the trial court's opinion and findings. The following quotations from the opinion illustrate what respondent means:

> "The evidence is not clear as to the extent of the negotiations between Mr. Wilson and Mr. Spofford on the one hand, and the Department of Justice on the other, although it is clear that contact was made with the Department and possible settlement arrangements were discussed, but without finality.
>
> * * *
>
> "After Dr. Schaefer's direct negotiations with Mr. Kennedy, Mr. Wilson expressed a willingness to withdraw completely as trustee. From the October, 1961 meeting between Mr. Kennedy and Dr. Schaefer, Mr. Wilson ceased to participate in any negotiations concerning Interhandel. In March, 1963, he formally terminated his trusteeship.
>
> * * *
>
> "Plaintiff contends that, except for the intervention of Dr. Schaefer, Mr. Charles E. Wilson would have been able to negotiate a disposition of the matter at least as favorable, and possibly more favorable to Interhandel, than that which was the result of the intervention of Dr. Schaefer with the Attorney General.
>
> "This obviously is pure speculation. No agreement had been reached during the period when Mr. Charles E. Wilson and his attorney, Mr. Spofford, were actively engaged and the record is devoid of any evidence from which a determination can be made of the part which their efforts contributed to the ultimate result which was accomplished."

---

[8] Dr. Schaefer testified—and the written evidence proved—that Mr. Wilson agreed that whenever respondent wished him to terminate the power of attorney, he would be willing to do so (R. 64, pp. 1301-4, R. 64, p. 1361, R. 65, pp. 1405-6; Deft. Ex. 7; R. 58: 607, Deft. Ex. 59; R. 63: 1243, 1244; Pl. Ex. 145; R. 60: 942, 943).

At page 10 petitioner states that the activities of Dr. Schaefer were conducted "secretly and without the knowledge of Mr. Wilson." The facts at trial showed the opposite to be true. Dr. Schaefer proceeded openly in every respect. The evidence showed that Charles Wilson made no headway during the Republican Administration. Dr. Schaefer became impatient with the lack of progress and decided he would personally come to the United States to see for himself what was the status of the matter (Op., p. 24; R. 65, p. 1452; R. 66, p. 1578). This decision was explained to petitioner thereafter, Mr. Spofford in a letter of March 31, 1961, endorsed Dr. Schaefer's program and reconfirmed the willingness of Charles Wilson to surrender the trusteeship whenever requested (Deft. Ex. 67; R. 65: 1511, 1512). Mr. Wilson's willingness to relinquish the trusteeship is contained in his letter of March 27, 1961 (Pl. Ex. 145; R. 60: 942, 943). Dr. Schaefer's negotiations were well known to Charles Wilson and Mr. Spofford and they even went so far as to advise on certain strategies during the negotiations (Pl. Ex. 172; R. 60: 953, 953; Pl. Ex. 189; R. 64: 1345, 1346; Pl. Ex. 143; R. 60: 939, 939; Pl. Ex. 144 R. 60, 939, 941; Deft. Ex. 58; R. 63: 1237, 1237; Deft. Ex. 62; R. 66: 1607, 1612; Deft. Ex. 63; R. 66: 1608, 1612; Deft. Ex. 74; R. 66: 1624, 1626, R. 66, pp. 1594, 1596, 1609-11; R. 62, pp. 1370-2, 1415-16).

The reference to petitioner's services for a number of American corporations (Pet. 6-7) is wholly without relevance to the object of the petition. These services were rendered to and for the corporations named, and not for respondent. Accordingly, the statement that petitioner "expended a great deal of time, money and effort" has nothing whatever to do with his claim for compensation against respondent. By his own

testimony petitioner fixes the time of these activities to have been from 1947 through December, 1958 when his employment agreement with Food Machinery Company expired.[9]

Finally, the services rendered by petitioner *after* May 1960, when Mr. Charles Wilson accepted his commission, and referred to by petitioner on page 10 of his petition, are another example of diversionary tactics. Not only is no claim *now* being made for such services, but, in addition respondent paid petitioner $2,000 a month for 19 months beginning with June 1960 for these services.[10] Petitioner was dissatisfied with the amount of these payments and added a second count to his complaint for a total of $150,000 for that period, but without explanation he dismissed that count at the beginning of the trial. See the three opening paragraphs of the trial court's opinion.[11]

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[9] The trial judge pointed out that the largest offer to petitioner came from Shields & Company—$900,000 if petitioner's negotiations with respondent brought about a sale of GAF (Op., p. 30); and added near the end of his opinion that such was not evidence of the value of petitioner's services as a finder.

> "... Certainly, services rendered as the prime agent and prime negotiator are materially and substantially different from those for which plaintiff now seeks compensation." (Op., p. 34)

[10] See the trial court's opinion at Op., p. 28 where it is stated:

> "4. Plaintiff was compensated, at $2,000 per month, for services rendered Interhandel *after* Mr. Wilson accepted the trusteeship. This compensation continued from June 1, 1960 through December 31, 1961 . . .".

[11] These three paragraphs are quoted as follows:

> "Plaintiff, Robert A. Schmitz, seeks compensation for services rendered defendant corporation, Societe Internationale Pour Participations Industrielles et Commerciales, S.A. (hereinafter Interhandel).
>
> "Plaintiff's complaint and pre-trial statement listed two counts. The first was for services rendered as a 'finder' who

The trial judge devoted several pages of his well-reasoned opinion to a discussion of the measure of damages, the burden of proving such damages and the evidence presented at trial. He stated that without some evidence as to the reasonable value of the services rendered he would have to engage in impermissible speculation as to the amount of damages and he concluded that since there "was no evidence as to the value of plaintiff's services" he was compelled to deny recovery (Op., pp. 32-34).

Following the adverse opinion of the trial judge, petitioner moved for reconsideration or alternatively, to open the judgment and take additional testimony (App., pp. 2(a)-7(a)). The reconsideration portion of the motion urged (1) that the trial court's determination that there was no express agreement was against the weight of the evidence and (2) that there was ample evidence present "to demonstrate the value of [petitioner's] services". The portion of the motion requesting the court to reopen the proceedings was couched in the following language:

> "7. If, however, the Court believes that actual proof of the value of services is necessary for recovery by the plaintiff, then the Court is requested to reopen the proceedings in accordance with the provisions of Rule 59 of the Federal Rules of Civil Procedure, to permit plaintiff to present evidence as to the value of the services performed by him." (App., p. 4a)

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procured Mr. Charles E. Wilson to act as agent for Interhandel. The second was for services rendered to Interhandel after Mr. Wilson consented to represent Interhandel.

"At trial, plaintiff announced that he would proceed only with Count 1, that is, for compensation for procuring the services of Mr. Wilson. Only this is before the court."

Petitioner enlarged upon these points in a memorandum of additional points and authorities filed in support of his motion. With regard to reopening, the memorandum said:

> "While plaintiff believes that there is ample evidence in the trial record to enable the Court to assess the damages to which he is entitled, it may be that the Court will wish to hear certain additional testimony on the question of the value of plaintiff's services. Attached hereto as Exhibit "B" is the affidavit of Charles E. Wilson which would indicate certain additional matters as to which he could testify if afforded the opportunity to do so. Plaintiff expects to obtain expert testimony from the financial community in New York City bearing on this issue. Accordingly, if the Court is not satisfied with the state of the record on the question of the value of plaintiff's services, plaintiff respectfully requests the Court to reopen the judgment to enable the plaintiff to adduce additional testimony by the trustee and by certain experts in the field of industry and finance." (App., pp. 22a-23a)

The affidavit of Charles Wilson [12] contained only two statements of substance, neither of which can be reconciled with the case petitioner presented at trial:

(1) That the fixing of the amount of petitioner's "fees" was in affiant's sole discretion.

(2) That it was affiant's "firm judgment" from April 30, 1960 "that the reasonable value of the *said services* . . . was not less than five percent (5%) of the sums recovered"; and that affiant would have paid petitioner not less than 5% (emphasis supplied).

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[12] Since Mr. Charles Wilson is now dead, the substance of his affidavit is not provable, even assuming it to have contained acceptable evidence. As shown hereinafter, it is not in accordance with the facts.

During the arguments on the post-trial motion, petitioner made it perfectly clear that he had adduced no evidence of the value of his services and that this decision was made because petitioner felt that a percentage of the ultimate settlement would be the appropriate measure:

> "THE COURT: So, we do have a situation, if I may interrupt you, we do have a situation where for a period of time between the time that Mr. Schmitz went to work on this project and the time Mr. Wilson was appointed, accepted the trusteeship, Mr. Schmitz rendered some services.
>
> "Have you offered any evidence as to the value of those services?
>
> "MR. O'DONOGHUE: No, we have not, because we consider that they were related to the result . . .". (App. p., 41a)

The trial court made it equally clear that the "result" was not due to petitioner's services. The Opinion (pp. 24-25) so stated and in the following colloquys the trial judge reaffirmed that conclusion:

> "THE COURT: I don't have any recollection of having found the services rendered by Mr. Schmitz—
>
> "MR. O'DONOGHUE: —quasi—
>
> "THE COURT: (Continuing)—had any causal relation with the enrichment of Interhandel. Do I make that clear?
>
> "MR. O'DONOGHUE: I see what you mean, that his services did not contribute to the result?
>
> "THE COURT: Not the result of.
>
> "MR. O'DONOGHUE: I don't know that your Honor found that they did not.

"THE COURT: I think I did. I think that's a reasonable interpretation of it. I found he rendered a service, but I don't think I found those services contributed in any way to the settlement that was ultimately negotiated." (App., p. 30a)

* * *

"THE COURT: Don't you, in every instance, use your percentage figure as a percentage of the settlement?

"MR. O'DONOGHUE: Yes.

"THE COURT: —or of some other settlement which would have been larger than that ultimately accomplished?

"MR. O'DONOGHUE: That's right.

"THE COURT: Haven't I found Mr. Schmitz did not accomplish that?

"MR. O'DONOGHUE: Well, let us suppose your Honor has done that. You have certainly stated it today." (App., pp. 40a-41a)

After such full briefing and oral argument the trial court denied the motion saying, in part:

"... the court is of opinion that plaintiff has failed to demonstrate either manifest error of fact or law or to establish any other facts which entitle plaintiff to a complete or partial new trial." (App., p. 43a)

This decision was fully briefed, argued and affirmed by a unanimous Court of Appeals in a *per curiam* order of affirmance which expressed the appellate court's "agreement with the findings of fact and conclusions of law filed by the District Judge" (Pet., App., p. 35) [13]

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[13] See footnote 4, *supra*.

REASONS FOR DENYING THE WRIT

I.

THE LOWER COURTS' DECISIONS WITH REGARD TO THE POST-TRIAL MOTION WERE REQUIRED BY UNIFORM LAW AND THE DECISIONS OF THIS COURT

The memoranda of the parties with respect to the post-trial motion in the District Court are included in the Appendix hereto so that this Court may see at first hand the narrow extent of petitioner's presentation to the trial judge as well as respondent's analysis of petitioner's position.

The petition herein is based on two principle contentions, the first being that the lower courts misconstrued the federal rule as to damages; and the other, that the trial judge's denial of the alternate motion to open was an abuse of discretion.

Prior to answering these contentions, respondent will answer that part of page 14 of the petition which mentions that the record contained three indicia of the worth of petitioner's services. The first concerned his agency agreements with American corporations interested in acquiring respondent's stock in GAF. The trial court discussed this and concluded that such agreements did not measure the value of petitioner's services as a "finder" of Charles Wilson (Op., pp. 30, 34). The lower court was obviously correct. The second so-called indicia has to do with the alleged rise in the market price of respondent's stock. This rise was in no way a measure of the value of petitioner's services as a finder. Moreover, it benefited stockholders—not respondent. The third, which has to do with Charles Wilson's payment of claims of between twenty and thirty million dollars, is certainly no proof of the value of petitioner's services. In fact, Charles Wilson had no

idea what claims were to be satisfied with that amount of money (R. 59, p. 892) and he did not during the trial state that he was to pay petitioner any part of that sum. The evidence showed that respondent actually paid twenty-four million dollars to satisfy the government's tax claim and to pay for the value of respondent's shares in the possession of the attorney general (R. 65, pp. 1521-5). In sum, the trial court's conclusion that there was *no evidence* as to the value of petitioner's services is well supported and the denial of reconsideration was required.

The following will show that there is no merit in petitioner's two principal contentions and that, under Rule 19 of this Court, there are no special or important reasons for granting the writ.

A. The Lower Courts Did Not Misconstrue the Federal Rule as to Damages.

The trial judge was faced with an absolute void in the proof of damages. The fact that there was none is traceable to a deliberate decision by petitioner whose trial strategy was aimed at a judgment of 5% of either $121,000,000 or $145,000,000.[14] This much was conceded when petitioner's attorney, during argument of the post-trial motion, explained that no evidence as to the value of petitioner's services had been offered ". . . because we consider that they were related to the result . . ." (App. p. 41a). In the same response counsel further explained:

> "We have not presented evidence on that because we believe the whole thing was so intimately tied together as to not be capable of divorcement."

[14] During argument in the Court of Appeals, Judge Wright observed that petitioner "had gone for broke."

On these facts, the courts below properly construed and applied the law. The opinion of the trial judge discussed the applicable principles and said:

> "It is up to the court as fact-finder to determine what is the reasonable value of plaintiff's services to defendant. However, it is axiomatic that the fact-finder cannot decide an issue unless there exists some evidence at trial on that issue. There must be something introduced in evidence upon which the fact-finder can base a verdict. Speculation cannot supply the place of proof." (Op., p. 32, citations omitted)

This statement is not a misconstruction; it accords in every respect with the teachings of this Court which uniformly require that there must be evidence to support an award of damages.

The cases cited by petitioner are not to the contrary. In *Hetzel* v. *Baltimore & Ohio Railroad Company,* 169 U.S. 26, 42 L.ed 648 (1898), this Court noted, in a suit for damages for the obstruction of the plaintiff's property by the railroad, that the plaintiff introduced testimony "of experts as to the value of the land with the D street track there and with that track removed" and testimony of real estate agents as to the inability of plaintiff to sell the land because of the obstruction (169 U.S. at 29). Thus, there was substantial evidence upon which damages could have been predicated.

Eastman Kodak Co. v. *Southern Photo Materials Co.,* 273 U.S. 359, 71 L.ed 684 (1927), involved damages for loss of business in an anti-trust action. This Court summarized the specific evidence pertaining to damages (273 U.S. at p. 376) and observed that the evidence

was such that the jury did not have to speculate or guess.

In *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 90 L.ed 652 (1946), this court held that "even where the defendant by his own wrong has prevented a more precise computation [of damages], the jury may not render a verdict based on speculation or guesswork . . .". Having stated this principle, this Court examined the evidence and concluded there was support for the damage award (327 U.S. at p. 266).

In *Palmer* v. *Connecticut Ry. & Lighting Co.*, 311 U.S. 544, 85 L.ed 336 (1941), this Court stated the principle that the requirement of certainty as to the amount of damages requires that the evidence be such as to provide "a basis for a reasoned conclusion" (311 U.S. at p. 561).

Petitioner's other authorities are to the same effect. Each requires that the *evidence* show the extent of the damages at least as a matter of reasonable inference. Here, petitioner's failure to establish the reasonable value of his services is fatal to recovery and the courts below were required to so hold.

B. The Trial Court, in the Exercise of Its Discretion, Properly Denied Petitioner's Motion To Reopen.

The trial judge must exercise a sound discretion when deciding a motion for new trial under Rule 59(a) of the Federal Rules of Civil Procedure, and his decision will not be reversed unless there is a clear abuse of that discretion. *Knight* v. *Hersh*, 114 U.S. App. D.C. 198, 313 F.2d 879 (1963); *Bates* v. *Hensley*, 414 F.2d 1006, 1011 (8th Cir. 1969); and *United States* v. *Bucon Construction Company*, 430 F.2d 420 (5th Cir. 1970). For the reasons which follow, respondent submits the trial court did not abuse its discretion.

Petitioner's motion does not make the showings required under Rule 59(a), that (1) petitioner exercised due diligence timely to obtain the "new" evidence and (2) that the newly discovered evidence would probably change the result. *Knight* v. *Hersh, supra.* Implicit in these requirements is the further requirement that the new evidence be described with sufficient specificity to permit the court to apply the *Knight* v. *Hersh* criteria. Petitioner's motion to reopen did not make any of the three required showings.

Petitioner seeks to excuse his shortcoming by charging the trial judge with an abuse of discretion because "[t]he inconsistent decision of the trial court . . . caught petitioner by surprise" (Pet., p. 17). This is explained on the same page where petitioner says that he "fully expected the trial court to find that there was an express contract whereby he was to receive 5% of the amount of the recovery . . .". There was not only nothing inconsistent in the opinion but petitioner's attempted justification ignores the fact that he was required to prove all the elements of each of the alternate theories upon which he sought to recover. This he did not do.

The record before the trial judge showed that petitioner made a conscious choice not to present evidence as to the value of his services. The facts simply did not warrant a conclusion by the trial judge that petitioner exercised reasonable diligence.

In addition, petitioner made no showing that the evidence he hoped to obtain would be such as to change the decision. The thrust of the motion was that while sufficient evidence had been presented petitioner would obtain additional evidence *if the court thinks insufficient evidence was presented* (App., p. 5a). At this

time, it was encumbent upon petitioner, not the court, to take the initiative and advise the Court of the testimony he would offer at a reopening. Instead, counsel merely stated that petitioner *expects to obtain* expert testimony from the financial community in New York City *bearing on the value of* petitioner's services (App., 22a). This statement, which was included in the "Points and Authorities", did not even take the trouble to tell the court of what the expected "expert testimony" would consist. The most that was stated was that it would *bear upon* the value of plaintiff's services. Plaintiff had ample time both before and after the trial in which to develop such evidence and yet he failed to identify a witness or to describe the proposed testimony. Judgments would never be *final* if such representations could be the basis for re-opening a case. See District Judge Keech's remarks in *Rue* v. *Fuez Construction Co.*, (D.C.D.C. 1952) 103 F.Supp. 499 at page 502 *et. seq.* (App. 28a-29a), where he stated, in part:

> "Public policy and the court calendar are such as not to permit a party litigant to gamble on reliance on one theory at the trial and, after a contrary view of the evidence is adopted by the court and is to be followed in its judgment on the facts of record, to seek to reopen the case to meet the other issues raised by that record, in an attempt to make for a finding in its favor on the theory adopted by the court."

The affidavit of Charles Wilson is not sufficient to indicate the probability of a changed result if he offered more testimony. His only two substantive statements are wholly inconsistent with petitioner's proof at trial. There was not one word during the trial that Charles Wilson had the "sole discretion" to fix the amount of petitioner's "fee". Moreover, if it had *al-*

ways been Mr. Wilson's "firm judgment" that the reasonable value of petitioner's services was 5%, the testimony was neither newly discovered, nor did he testify to that effect at trial.

Charles Wilson testified at trial that petitioner's fee was not tied merely to procuring him (Charles Wilson) to undertake the trusteeship (R. 60, pp. 1223-4). Therefore, in his affidavit he could not have been treating petitioner's compensation as a finder's fee and his testimony would not have been relevant to that issue.

Finally, the trial court's decision conformed to *Souza* v. *Corvick*, 142 U.S. App. D.C. 323, 441 F.2d 1013 (1970), another case where the plaintiff did not offer any evidence of the amount of damages to her house which developed cracks after a sewer was constructed near her property. A verdict was directed for the defendant. While the Court of Appeals reversed for a new trial on other aspects of the case, it specifically held that on retrial the plaintiff could not "introduce new evidence as to the amount of damage to her realty." (*Id.*, footnote, 6).

Respondent submits that there was no abuse of discretion by the lower courts.

II.

THE PETITION DOES NOT PRESENT A QUESTION JUSTIFYING THE GRANT OF CERTIORARI

No "Supreme Court question" is presented by the petition. This is a typical case which involves the exercise of a trial judge's discretion which has been reviewed and affirmed by the Court of Appeals—unanimously and *per curiam*—after extensive briefing and oral argument. It is patent that the considerations usually forming the basis for review require denial of

the petition and that the rule stated by Mr. Justice Brennan in *Appalachian Power Company* v. *American Institute of Certified Public Accountants,* 4 L.ed.2d 30, 32 (1959) [15] should be applied:

> "Ordinarily an application by a District Court of the Rules of Civil Procedure when affirmed by the Court of Appeals will not be reviewed by this Court. This is particularly true where, as here, the question is one that concerns the judgment of the District Court in relation to a particular set of facts."

Petitioner has cited two recent cases of this Court to support his conclusion that certiorari should be granted. The first, *International Terminal Operating Co.* v. *N.V. Nedre Amerik,* 393 U.S. 74, 21 L.ed.2d 58 (1968), which petitioner characterizes as "an ordinary civil case", was actually a case involving denial of the Seventh Amendment right to jury trial. Moreover, the opinion specifically noted (393 U.S. at p. 75) that the decision of the Court of Appeals was in conflict with this Court's decision in *Atlantic & Gulf Stevedores, Inc.* v. *Elleman Lines, Ltd.,* 369 U.S. 355, 7 L.ed.2d 798 (1962).

The second, *Norfolk Monument Company, Inc.* v. *Woodlawn Memorial Gardens, Inc.,* 394 U.S. 700, 22 L.ed.2d 658 (1969), was an anti-trust case which involved denial of the right to a jury trial. The Court of Appeals had affirmed the trial court's grant of summary judgment for defendants. This Court found there were material issues of fact which called for resolution by a jury and it also noted that the principle reason for the trial judge's decision was not in accord with two decisions of this Court. Thus, neither of the

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[15] Not reported in U. S. Reports.

cases relied on by petitioner calls for the grant of certiorari in the instant case.

While petitioner cites the Due Process Clause of the Fifth Amendment of the Constitution as being involved here, this is not so. After citing the Constitutional provision on page 3 of the petition it is not again mentioned for the obvious reason that it is not involved. Nor is any Constitutional provision at stake as, for example, the unlawful deprivation of a jury trial or any other procedural defect.

CONCLUSION

The petition presents no sound reason for this Court to review the proceedings below and, accordingly, it should be denied.

Respectfully submitted,

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July 13, 1972

APPENDIX

APPENDIX

APPENDIX

Post Trial Proceedings

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Final Judgment

This cause came on for trial by the Court, a jury having been waived, and evidence having been adduced by the parties, and counsel having submitted proposed findings of fact and conclusions of law, and having orally argued their respective positions, the Court upon consideration of all of the foregoing on May 7, 1970 filed its Opinion herein, in which its Findings of Fact and Conclusions of law appear, and having found therein that all relief shall be denied plaintiff, it is, by the Court, this 15th day of May, 1970

ORDERED, pursuant to Rule 58 of the Federal Rules of Civil Procedure, that judgment be and it is hereby entered for the defendant; and that allowable costs shall be taxed against the plaintiff.

JOSEPH C. MCGARRAGHY
District Judge

Plaintiff's Motion for Reconsideration or, Alternatively, To Open the Judgment and Take Additional Testimony

Comes now the plaintiff, by counsel and moves this Honorable Court to reconsider its opinion and judgment in the above referenced civil action and to open the Judgment, heretofore entered, and take additional testimony, and in support thereof states as follows:

1. The Opinion of the Court in lieu of Findings of Fact and Conclusions of Law was filed in this case on May 7, 1970, and a Judgment in favor of the defendant was entered on May 15, 1970.

2. Plaintiff's action was predicated upon two bases: (a) an oral contract with defendant whereby, if plaintiff was successful in obtaining the consent of Charles E. Wilson to serve as trustee for defendant in connection with its effort to resolve its long-pending suit against the government, plaintiff would be paid 5% of the avails of such settlement, out of the fund itself, by the trustee, and (b) an equitable lien upon the fund. In its Findings and its Conclusions, the Court rejected both bases and disallowed any recovery by plaintiff for the services which he rendered to defendant.

3. The Court's determination that plaintiff failed to prove his oral contract is against the weight of the evidence. In support of its determination, the Court has set forth nine separate circumstances which it apparently feels discredit the evidence plaintiff presented in support of his claim. It should immediately be noted that the Court apparently was reacting to what appeared to be the cumulative effect of these circumstances since none of the nine matters cited, standing alone, could rebut plaintiff's assertion.

4. The contract was not in writing and for good reason. The GAF controversy was a tremendously complex international controversy involving hundreds of millions of dollars. Because the settlement of this matter involved high finance, politics and much emotion, any effort to bring about such a settlement had necessarily to be a very sensitive

endeavor and had to be accomplished without harmful publicity. For this reason plaintiff was required by the defendant and later by the trustee to remain out of the limelight. The wisdom of this requirement is pointed up by the attached newspaper article which appeared when the plaintiff herein sought to intervene in defendant's return suit (Civil No. 4360-48), and which is designated as Exhibit "A" hereto. Moreover, because plaintiff trusted the promises of the defendant made to him in Zurich and in Paris (See, e.g., Pl. Ex. No. 70) and because he knew and respected the trustee who would be satisfying plaintiff's claim, plaintiff had no reason to believe that he would not be paid out of the Thirty Million Dollars ($30,000,000.00) which Dr. Schaefer told the trustee he could spend in order to satisfy claims. (See, Tr. 228, 892) Plaintiff's letter of July 13, 1960, (Def. Ex. No. 1) did not relate to defendant's express promise to pay him 5%, but rather was directed toward compensation which plaintiff might receive for interim services. (See, Pl. Ex. No. 78; compare Def. Ex. No. 1 with Pl. Ex. No. 70) For plaintiff to ignore financial consideration in connection with the unique services which he rendered would have been foolish in light of plaintiff's large family, his declining personal wealth and the time, effort and expense he devoted to defendant's cause. In all of plaintiff's earlier arrangements with would-be American corporate purchasers, plaintiff always took steps to insure that he would be compensated for his efforts. In fact, testimony was presented to show that on one occasion plaintiff would have been entitled to receive $175,000.00 cash plus an option to buy ten percent (10%) of the stock acquired by the successful purchaser, with financing guaranteed, had the acquisition been completed. (Tr. 63, 477-78, 881; Pl. Ex. No. 6)

5. The Court's determination that plaintiff's claim in quantum meruit must fall because of a failure to prove damages is improper. There was ample evidence presented at trial to demonstrate the value of the trusteeship to Inter-

handel. The dramatic increase in the value of Interhandel's shares on the Zurich bourse, added some 55 to 60 million dollars to the net worth of Interhandel. It was enriched by this amount as a direct and immediate result of plaintiff's effort. Plaintiff was entitled to a proportionate share of such enrichment. The fact that the trustee had authority to expend Thirty Million Dollars ($30,000,000.00), if necessary, to satisfy claimants in this controversy, (Tr. 228, 892) is indicative of the value which Interhandel itself placed upon the trusteeship. This was a measure of the value that the defendant itself placed on these services. These measures are, however, sufficient to enable the Court to determine a just and reasonable amount for the value of plaintiff's services.

6. The Court has attempted to follow the wellknown rule that speculative damages may not be awarded. The trier of the facts is not authorized or required to determine damages where the damages are uncertain, but this principle of speculation with regard to damages is not applicable to the amount, but only to the existence of damages at all. Here services were proved as recognized by the Court in its opinion, but the Court has said there was not proof of the value of the services. As the Supreme Court said in *Story Parchment Company v. Paterson Parchment Paper Company,* 282 U.S. 555-568 (1931), the uncertainty as to the amount of damages will not defeat a claim on the theory of speculation. Where damages have been established, it is for the trier of the facts to fix the fair amount of such damages, in this case the fair value of the services based on the benefits conferred by plaintiff's activities to the defendant.

7. If, however, the Court believes that actual proof of the value of services is necessary for recovery by the plaintiff, then the Court is requested to reopen the proceedings in accordance with the provisions of Rule 59 of the Federal Rules of Civil Procedure, to permit plaintiff to present evidence as to the value of the services performed by him.

WHEREFORE, the premises considered, plaintiff moves this Court to reconsider the decision heretofore reached in the instant case or, alternatively, to open the Judgment and take additional testimony.

Exhibit "A", May 19, 1964

WASHINGTON MERRY-GO-ROUND

DREW PEARSON

Washington.

Two heart-sickening legal proceedings which have some bearing on each other are taking place in opposite parts of the world today. One is in Frankfurt, Germany, where the Nazi killers of Auschwitz are on trial; the other in Washington, D. C., where the war-seized property of I. G. Farben is being disposed of.

In Frankfurt, gruesome testimony tells of special rations of liquor and cigarets for Nazis who performed extra work in killing Jewish prisoners. A Polish doctor who served as a clerk at Auschwitz told of keeping the records of 130,000 male inmates killed.

In Washington, in the other court proceeding, Attorney General Kennedy has authorized the sale of General Aniline and Film, the very valuable property once owned by I. G. Farben, back, in part, to the Swiss company which served as the dummy for I. G. Farben.

It was, of course, I. G. Farben which used the Auschwitz slave labor.

Despite this, and despite the fact that every other U. S. Attorney General has refused to return any of I. G. Farben's property, Bobby Kennedy has now completed a deal whereby $60,000,000 will revert to Interhandel.

The big mystery is—why? Perhaps Sen. Keating (R-N.Y.), a member of the Senate Judiciary Committee with a good record on religious fairness, should investigate.

* * *

Meanwhile, a side court action which sheds some light on the dickering over I. G. Farben's property in the U. S., has been filed in the U. S. District Court in Washington. It's a petition to get a slice of the profit from the sale of General Aniline & Film, filed by Robert A. Schmitz, an American whose uncle, Herman Schmitz, was convicted as a war criminal for building the I. G. Farben plant alongside Auschwitz in order to use Jewish slave labor. Robert Schmitz's father, Detrick (sic), was the head of General Aniline, I. G. Farben's property in the U. S.

He now claims a 5 per cent commission for helping arrange the sale of General Aniline stock and tells an interesting story about the scramble to get hold of this valuable property. Between 1947 and 1958, Schmitz says, he was suucessively authorized to act as agent for Remington Rand, headed by the late Gen. Douglas MacArthur; the Atlas Corporation, headed by financier Floyd Odlum; Shields and Co.; W. R. Grace and Co.; Food Machinery and Chemical, all anxious to obtain this valuable property.

Schmitz also tells how in December, 1958, it was decided to pick an important American to negotiate with the U. S. government—namely Charles E. Wilson, former president of General Electric, who had served as chairman of the War Production Board and was president of Ike's People-to-People Foundation.

• • •

Wilson served without pay, according to Schmitz, because he believed in Interhandel and looked upon the confiscation of I. G. Farben's property as against U. S. interests—also illegal and immoral.

In the summer of 1961, Robert F. Kennedy had become Attorney General and appeared to reverse the policies of all previous Attorneys General that the General Aniline and Film property should not be sold back to any organization having ties with I. G. Farben. Previous Attorneys General had consistently ruled that Interhandel was a cloaking operation for I. G. Farben.

When Bobby Kennedy took over, the help of Charles E. Wilson was no longer considered necessary. Interhandel felt confident that with Kennedy running the Justice Dept. it would be able to obtain the property which other Attorneys General, both Republican and Democratic, had refused to relinquish.

So Wilson was given the hint to bow out. He did so in November, 1962.

Additional Points and Authorities in Support of Plaintiff's Motion for Reconsideration or Alternatively To Open the Judgment and Take Additional Testimony

I

THE EVIDENCE PRESENTED AT TRIAL ESTABLISHED THE EXISTENCE OF A VALID ORAL PROMISE TO COMPENSATE PLAINTIFF AND TO AFFORD HIM AN EXPRESS EQUITABLE LIEN UPON THE PROCEEDS OF THE SETTLEMENT

A. Ample Evidence Was Presented at Trial To Prove Dr. Schaefer's Promise To Compensate Plaintiff and To Give Him an Equitable Lien.

1. The Promise Itself.

Plaintiff testified at trial that on October 26, 1959, Dr. Alfred Schaefer, the chief executive officer of defendant corporation, unequivocably promised that plaintiff would be paid a sum equal to 5% of the avails of the expected settlement of the General Aniline and Film controversy if plaintiff was able to obtain the consent of Charles E. Wilson to serve as defendant corporation's trustee in negotiating with the United States Government for a settlement of the GAF matter. (Tr. 155-56, 397-98, 426, 431-32) Payment was to be made by the trustee out of the fund representing the proceeds of the sale. (Tr. 155-56, 397-98, 431-32) Plaintiff was cross-examined vigorously by defendant's trial counsel, but his version of the October 26, 1959 meeting was not contradicted.

2. The Reasonableness of the Promise.

Under all of the circumstances of the case, the promise of a 5% "commission" was a fair and reasonable compensation for the services which plaintiff was to render.[1] At the time that the promise was made, defendant corporation had very little prospect of a prompt resolution of its suit seeking the return of GAF. In fact, the prospects for ever securing the return of this property were bleak. (Tr. 29, 544, 548, 1295) Defendant corporation with the aid of the Swiss Government previously had attempted various interventions with United States Government officials to try to secure the return of their property but all had been complete failures. (Tr. 15, 16, 1299-B, 1583, 1649; Def. Ex. No. 86; Pl. Ex. No. 105) Since GAF, which represented approximately 90% of Interhandel's total assets, was declining in value (Tr. 902, 981, 1283-84, 1373; Pl. Ex. No. 161) and since a complete reorganization of Interhandel's management had only shortly before taken place, (Tr. 1276, 1278) the Swiss were "exceedingly anxious" to secure the return of their property. (Tr. 1298) Moreover, the Swiss stockholders were becoming increasingly vocal about the delays in the resolution of the GAF controversy. (Tr. 195; Pl. Ex. Nos. 187, 194) In fact, in 1959, the only access the Swiss had to the United States Government and to the former management of GAF was through the plaintiff and his experience and knowledge were unique and invaluable to them.

Plaintiff was a "finder" of the trustee in the most literal sense of the word. It was plaintiff who originally conceived of the idea of the Swiss appointing an American citizen of indisputable integrity and sound judgment to

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[1] In fact, testimony was presented to show that on one occasion plaintiff would have been entitled to receive $175,000.00 cash plus an option to buy ten per cent (10%) of the stock by the successful purchaser, with financing guaranteed, had the acquisition been completed. (Tr. 63, 477-78, 881; Pl. Ex. No. 6)

assume a trusteeship of GAF for the benefit of the Swiss and to undertake negotiations on their behalf with the United States Government. (Tr. 149-54, 648, 1288-89; Pl. Ex. Nos. 22, 23, 25) It was plaintiff too, who put forth the name of Charles E. Wilson and it was plaintiff who had the means whereby he could secure the consent of this distinguished American to serve the Swiss.

> "A 'finder', it has been said, is one who finds, interests, introduces and brings together parties for a deal, even though he has no part in negotiating the terms of the transaction. [citing cases] As compensation for his services, a finder customarily receives a commission or finder's fee, frequently based upon a prior oral agreement with the party for whom he did the finding."

Baldwin v. *Grymes,* 232 Md. 470, 194 A.2d 285, 287 (1963); see also *Ames* v. *Ideal Cement Co.,* 37 Misc. 2d 883, 235 N.Y.S. 2d 622, 625 (1962).

3. Plaintiff's Finder's Agreement Had to be Kept Secret.

Because of the sensitive nature of the proposed Wilson trusteeship, it was agreed by plaintiff and Dr. Schaefer that the entire matter of plaintiff's agreement with defendant corporation must be maintained in strictest confidence. (Pl. Ex. Nos. 22, 23) Consequently, there was no written agreement between the parties setting forth their agreement and it is submitted in matters such as this, a written agreement would have been quite unusual. See *Hardy-Latham* v. *Wellons,* 415 F.2d 674 (4th Cir. 1968); *Baldwin* v. *Grymes, supra.* A prime reason for the secrecy requirement was the fact that news of the effort to establish the trusteeship would activate the stock market and possibly touch off wild speculation. (Tr. 1276, 1402) Rejection of the proposed trusteeship, of course, would drive down the price of Interhandel shares, (See Tr. 150, 156) and make it impossible to secure the services of any other

distinguished Americans to aid their cause. Aside from the speculative nature of the matter, however, the plaintiff and the Swiss both realized that the linking of the name "Schmitz" to the proposed trusteeship could have adverse consequences in view of the connection of Hermann A. Schmitz and Dietrich A. Schmitz to the GAF controversy. The former was the financial head of I.G. Farben, who had been accused after World War II of war crimes, although later found not guilty at Nuremberg, (Tr. 152, 481) and the latter was alleged by the government to be Farben's agent in the United States. The wisdom of maintaining strict secrecy was pointed up several years later when Drew Pearson made sensational charges against plaintiff when he sought to intervene in Civil Action No. 4360-48. See attached Exhibit "A".

4. There Was Corroborative Evidence to Confirm the Promise.

The promise of compensation made to the plaintiff by Dr. Schaefer was corroboroated at trial in several ways. Plaintiff's Exhibit No. 70, a letter written by Dr. Schaefer to the plaintiff under date of August 30, 1960, made reference to defendant's agreement in Zurich and in Paris "to hold at your disposal certain sums as a compensation for the time you spent in this connection". Since there was no evidence of any discussion in Zurich that plaintiff should render any services to the trustee following acceptance of the trust, this letter can only mean that the Swiss agreed to set aside definite sums to compensate plaintiff for his services in obtaining the trusteeship itself. Moreover, Charles E. Wilson testified that at the Paris conference Dr. Schaefer declared that plaintiff would be "well taken care of" for the job that he "had done". (Tr. 895-96, 1021-23)

The existence of the promise to compensate plaintiff for devoting his full time and effort to the Swiss cause for a period of seven months (i.e., between late October,

1959 and late May, 1960), if not for the longer period from December, 1958 through May 23, 1960, during which plaintiff had been pursuing the trusteeship goal for the Swiss, is much more reasonable than the supposition that plaintiff was willing to donate his time and effort to the Swiss cause without remuneration. Ample evidence was presented at trial to show that in all of plaintiff's past dealings with would-be corporate purchasers of GAF, plaintiff always insisted upon first reaching an agreement as to his compensation. Secondly, several references were made during the course of plaintiff's direct and cross-examination to his large family and to his declining personal wealth as he began to devote more and more time and effort to a resolution of the GAF controversy.

5. The Amount of the Commission Was Not Unreasonable.

In its Opinion filed May 7, 1970, the Court states that "it strains credulity to believe that such a large commission was offered [to plaintiff] to do so little". Opinion, p. 12. The Court, of course, had reference to plaintiff's testimony that he had been promised compensation equal to 5% of the avails of the anticipated settlement if he could secure Mr. Wilson's acceptance of the trusteeship. Plaintiff submits that the Court is not considering the case with a proper perspective. The Swiss were greatly impressed with the reputation and ability of Charles E. Wilson (Tr. 155, 701-02, 720, 1288) and they felt that if Mr. Wilson would serve as their trustee he could soon resolve the long drawn out, seemingly interminable struggle to regain GAF. (Tr. 800, 1298) The Swiss were not able by themselves to secure Mr. Wilson's agreement to act as their agent. Plaintiff was the key to unlocking the door to secure Mr. Wilson's services, and all his capacities and reputation. Relying upon plaintiff's familiarity with Mr. Wilson, they accepted at face value plaintiff's statement that Mr. Wilson would not accept compensation for his services if he were to act as trus-

tee. (Tr. 155) It is not surprising then to find that the Swiss offered plaintiff the compensation which ordinarily they would have been willing to pay Charles E. Wilson for working out a settlement. Compared with the evidence that the Swiss were willing to pay $20,000,000 to $30,000,000 out of the settlement proceeds to satisfy all claims against GAF, Interhandel's properties in the United States, (Tr. 228, 892) the offer of a 5% commission is not out of line.

The defendant did not intend to compensate plaintiff for the amount of services which he was to render on their behalf in attempting to secure the consent of Mr. Wilson, but they intended to compensate him for the result which his services obtained. This is a common situation in business where very often a contact, or even knowledge of a business opportunity, can mean success or failure in a particular endeavor. The 5% figure represents the value to Interhandel of securing Mr. Wilson's agreement to serve on their behalf. They were not interested in the time spent or the labor exerted by plaintiff in accomplishing this purpose. An analogy can be drawn between the plaintiff's services in the present case and the services of a real estate broker in arranging for the sale of a valuable property. In cases involving real estate brokers the Courts inevitably will enforce a contract providing the broker with a fixed commission regardless of the amount involved so long as he has tendered performance under his contract. *Palmer* v. *Gleason*, 154 Colo. 145, 389 P.2d 90 (1964); *Nelson* v. *Reinhart*, 47 Nev. 246, 219 Pac. 554 (1923); 12 C.J.S. *Brokers*, § 112 (ed.). In this context it is appropriate to consider the language of the Supreme Court of Wisconsin in a suit by a broker for the recovery of his commission.

> "However, a real estate broker's commission is not based upon the amount of services but on the result of the services. A broker may spend much time and money trying to sell a piece of property, and fail entirely, while again he may succeed in making a sale

> at the expenditure of very little time or money. To hold that Ellis is not entitled to the amount of his claim is to disregard the testimony as to the value of such services." *In re Kayser's Est.*, 190 Wis. 189, 208 N.W. 895, 897 (1926).

Since plaintiff and Dr. Schaefer were dealing with each other at arms length on October 26, 1959, and no evidence has been presented that there was any overreaching on the part of the one or the other at that meeting, the Court should not be concerned about the value which the parties mutually placed upon plaintiff's services.

B. Plaintiff Felt No Need to Make a Record to Confirm His Compensation Agreement Since the Entire Matter Was One of Trust and He Was to Look to the Trustee for Payment.

In the Court's Opinion a great deal of emphasis is placed upon the fact that plaintiff did not immediately seek written or other confirmation of his compensation agreement once the trusteeship had been created. It must be remembered, however, that plaintiff's dealings with the Swiss involved the highest degree of mutual trust and fair dealing. In view of the praise heaped upon plaintiff at the Paris conference by Dr. Schaefer, (Tr. 225, 895-96, 1017, 1027) and in view of the fact that plaintiff was to be compensated for his services by the trustee out of the avails of the settlement, (Tr. 155-56, 397-98, 431-32) neither plaintiff nor defendant considered it necessary to formalize their understanding. (E.g., Pl. Ex. No. 70) Testimony was presented at trial that the trustee had been advised that plaintiff had an agreement with the Swiss whereby they would pay him 5% of the settlement (Tr. 1023) even though the trustee did not then recall when or under what circumstances the money was to be paid. The trustee also testified that at the Paris conference Dr. Schaefer told the plaintiff that he would be "well taken care of" for the job he had done. (Tr. 895-96)

Attached hereto and designated Exhibit "B", is an affidavit executed by Charles E. Wilson subsequent to the trial of this case setting forth his understanding that he was to be responsible for the payment of plaintiff's fee under his powers and trust and that he would have paid plaintiff not less than 5% of the sums that he would have recovered.

II

There Is Ample Evidence in the Record To Justify the Award of Damages to Plaintiff on an Implied Contract or in Quasi-Contract

A. The Court Has Declared That Plaintiff Is Entitled To Reasonable Compensation for His Services.

Plaintiff has established to the Court's satisfaction that he is entitled to be compensated for the services which he has rendered to defendant corporation. Opinion, p. 15. Accordingly, the Court has declared that there has been a breach by Interhandel of a contractual obligation to plaintiff, albeit one implied in law, and that plaintiff is entitled to recover for the resulting damages he has sustained. *Ibid,* pp. 15-16. The Court declined to award damages, however, for the reason that it did not believe that plaintiff has presented evidence of the reasonable value of his services.

B. Plaintiff Did Not Introduce Expert Testimony To Show the Value of His Services Because the Record Contains Many Indicia of Their Value.

The Court has concluded that no evidence as to the reasonable value of plaintiff's services in creating the trusteeship was adduced. Plaintiff respectfully disagrees. From the outset, the Swiss placed a very high value on the benefit they expected to receive from the trusteeship and this value found many expressions.

On the one hand, there are references in the record to the importance that the Swiss placed upon the trusteeship in terms of national honor and pride. The acceptance of the trust by Mr. Wilson was looked upon as a vindication of the Swiss and the righteousness of their case. At Paris, Dr. Schaefer pledged the honor of Switzerland and his own honor that Interhandel was free from enemy control or taint. (Tr. 223, 799, 890-91, 1299, 1299-A) But the best expression of the importance of the trusteeship is contained in the Resolution adopted by the Executive Committee of defendant's board of directors wherein, among other things, it is declared:

> "We submit and truly believe, that, while not only being just and morally right, the return to us of our heretofore vested property-of-record by the United States Government will do much to help clear the way towards an earliest effective implementation of a number of high policies and programs of the United States Government, and will serve the cause of peace, free private enterprise, and enhance the relations and prestige between the United States of America and all free nations of the world, . . ."

Pl. Ex. No. 47, Para. 21.

On the other hand, the record contains several references to the economic value of the trusteeship to the Swiss. At the Paris conference, Dr. Schaefer was so anxious to obtain the services of Charles E. Wilson as trustee that he pledged $20,000,000 to $30,000,000 to satisfy whatever claims might be presented against the settlement fund (Tr. 228, 892) giving the trustee sole discretion to settle these matters. (Tr. 230, 1301) On the Zurich Bourse, the quotations for Interhandel stock rose gradually while the negotiations were under way and steeply when the acceptance of the trusteeship was publicly announced. (Tr. 1480) The acceptance of the proffered trusteeship by Charles E. Wilson caused an increase of over 2,000 Swiss

francs per share on the Zurich exchange, or approximately 450 American dollars per share. (Tr. 1481) This meant, since there were approximately 110,000 shares outstanding, that the value of Charles E. Wilson's acceptance of the trusteeship, as appraised in the stock market, was approximately 55 million dollars. (Tr. 1483) The value of the stock maintained this level during the entire period of the active trusteeship and was still quoted at 4,900 Swiss francs in October, 1961. (Tr. 1484) It was only after the interference of Dr. Schaefer and his offer to accept only half the value of its GAF stock that the quoted value of the stock fell appreciably. (Tr. 1485) As it was, the ultimate amount received by Interhandel for its GAF stock was almost precisely the same as the price of the stock after Charles E. Wilson's acceptance of the powers. (Tr. 1483)

The right to the use of the money represented by Interhandel's share of GAF has a great value, too. Dr. Schaefer no doubt anticipated that Charles E. Wilson would be able, by his influence, to obtain a prompt return of the GAF shares (Tr. 800, 1304; Pl. Ex. No. 160) and thus not only make certain what was otherwise doubtful, but also enable the Swiss to earn many years of interest from the lending of such money. Indeed, if the value of Interhandel's share of the GAF stock is accepted as approximately $120,000,000, the amount ultimately received, the interest on this amount for only a single year would be at least $7,200,000, and probably much more if the high interest rates even then prevailing in Europe are taken into account.

C. Defendant Corporation Should Not Be Permitted To Escape Liability Because of Uncertainty in the Amount of Damages to be Awarded.

A party which has broken its contract will not be permitted to escape liability because of uncertainty in the amount of the damages resulting therefrom. The fact that the full extent of the damages for the breach may be a

matter of speculation is not a ground for refusing all damages.

> "[I]n applying the rule against the recovery of uncertain damages, it is the uncertainty as to their nature, and not as to their measure or extent, that is meant. While the actual amount of damages from the breach of a contract may not be susceptible of exact proof, the law does not permit one whose act has resulted in loss to another to escape liability on this account. The manner of measuring the damages having been ascertained, impossibilities in proving same are not required, but only that the best evidence be adduced of which the nature of the case is capable; in other words, the degree of certainty of the proof is dependent upon the character of the proceeding. Why should greater certainty be required as to proof of the amount of damages than in respect to any other part of a case? All that can be expected in any case is that the relevant facts tending to show the extent of the damages be placed before the jury to enable it to make such an intelligent estimate of the same as the circumstances of the case will admit."

City of Kennett v. *Katz Const. Co.*, 273 Mo. 279, 202 S.W. 558, 162, (1918). See also *General Finance Corp.* v. *Dillon*, 172 F.2d 924, 930 (10th Cir., 1949); *Kaiser* v. *Amalgamated Clothing Works*, 169 Va. 574, 194 S.E. 727 (1938); 25 C.J.S. *Damages*, § 28.

The authorities cited by the Court in its Opinion to the effect that damages must be proved with reasonable certainty and specificity for the most part pertain to values of real or personal property sold or exchanged. It is submitted that while the principle cited by the Court is applicable to that type of case, the rule of damages cited therein is ill-suited to the case involving the "sale" or "exchange" of advice and personal services which cannot be precisely valued in terms of dollars and cents. The

Supreme Court recognized this principle in *S.E.C.* v. *Capital Gains Bureau,* 375 U.S. 180 (1963), and that ruling was applied by our Court of Appeals in *Espaillat* v. *Berlitz School of Languages,* 127 U.S. App. D.C. 293, 383 F.2d 220 (1967). In the latter case, the trial court entered judgment n.o.v. for defendant in a suit for breach of contract brought by an instructor against the Berlitz Schools. The trial court rested its conclusion on the stated ground that there was insufficient evidence upon which the jury could ascertain the damages sustained by the plaintiff. In reversing the trial court decision, Judge Danaher declared that a contract suit involving personal services cannot be successfully defended merely because the damages suffered are difficult of ascertainment. The Court then quoted a portion of the Supreme Court's opinion in *Story Parchment Co.* v. *Patterson Parchment Paper Co.,* 282 U.S. 555, 563 1931) as follows:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise."

The Court has recognized that the negotiations leading up to, and the creation of, the Wilson trusteeship were unique matters. Under these circumstances it is difficult at best and perhaps impossible for the plaintiff to place a precise monetary value upon his services in accomplishing

the desires of the Swiss. Plaintiff submits that the Court, having already found that he is entitled to damages, should apply a liberal rule with respect to determining the amount of those damages. The language of the Court in *Wenzler & Ward Plumbing & Heating Co.* v. *Sellen,* 53 Wash. 2d 96, 330 P. 2d 1068, 1070 (1958), is noteworthy.

> "Therefore, when it is clearly apparent that the plaintiff has sustained actual damage from the defendant's wrong, a liberal rule is applied with respect to determining the amount of that damage. Moreover, where proof of actual damage to the plaintiff is available, uncertainty as to the exact amount thereof cannot deny to the plaintiff a right to recover any compensation at all". (Quoted with approval from 14 Cal. Jur. 2d 690, § 65.)

D. Interhandel Has Been Unjustly Enriched at Plaintiff's Expense by Receiving the Benefit of His Services Without Adequately Compensating Him.

1. The Measure of Recovery Is the Benefit Received by Interhandel.

On a claim of unjust enrichment the claimant must, of course, not only show that the other party has received a benefit but also that it has been at the expense of the claimant. *Lawrence Warehouse Co.* v. *Twohig,* 224 F. 2d 493 (8th Cir. 1955); *Herrmann* v. *Gleason,* 126 F. 2d 936 (6th Cir. 1942) The evidence presented in this case meets both of the criteria for a recovery on a theory of unjust enrichment. The benefit to the defendant need not be purely and simply a monetary benefit but it more properly can be described as an "advantage". The Supreme Court of Pennsylvania pointed this out in *Mechan* v. *Cheltenham Township,* 410 Pa. 446, 189 A. 2d 593 (1963), wherein it was stated that the measure of recovery under the doctrine of unjust enrichment was not plaintiff's loss, but rather the benefit which defendant had received from plaintiff's serv-

ices. To the same effect is *Lawrence Warehouse Co.* v. *Twohig, supra,* 224 F.2d at 498, and *Herrmann* v. *Gleason,* 126 F. 2d 936 (6th Cir. 1942).

2. Interhandel Was Benefitted Greatly by Plaintiff's Services in Obtaining the Wilson Trusteeship for It.

Plaintiff submits that the idea of creating the Wilson trusteeship and his implementation of that idea with the resolute backing and encouragement of the Swiss, conferred upon the latter a substantial advantage in terms of their dealings with the United States Government, with their own stockholders and with the financial community.

Reference has already been made to the value which the Swiss themselves placed upon the trusteeship, *supra,* page 8. Perhaps the greatest advantage however, was the ability to open negotiations directly with the United States Government, looking toward a resolution of the longstanding GAF controversy, which possessed for the first time a character of trust and confidence. While the Court has declared in its Opinion at pages 7 and 8 that it would be pure speculation to hold that the trustee and his attorney could have negotiated a disposition of the matter at least equal to that which came about as the result of the intervention of Dr. Schaefer, the fact remains that within a very short period of time and while the trusteeship was still in effect, Dr. Schaefer and the Attorney General were able to reach an agreement in principle regarding the settlement of the controversy. (Tr. 1423-25; Pl. Ex. Nos. 202, 204, 206) Since all previous efforts to negotiate with the United States Government in this matter had failed completely and since a new administration completely unfamiliar with the background of this long drawn out litigation had come to power, it is clear beyond a peradventure that the trusteeship enabled the prompt settlement of the litigation.

In evaluating plaintiff's claim for compensation on the basis of unjust enrichment, the Court should consider the following language from Professor Corbin's treatise on Contracts:

> "The availability of the remedy of restitution is not restricted to cases in which the defendant has been guilty of a breach of contract . . . Unjust enrichment, therefore, may be a sufficient reason for granting the quasi-contractual remedy of restitution, even though the granting of that remedy is not restricted to cases of unjust enrichment. If this is true in cases where the defendant has committed no wrongful act, it shall be true, *a fortiori*, if the defendant has been guilty of a breach of contract or other wrong."

5 Corbin *Contracts*, § 1107 (1964 ed.).

That the unjust enrichment theory applies in the District of Columbia is made clear in *Rosenkoff* v. *Finkelstein*, 90 U.S. App. D.C. 263, 195 F.2d 203 (1952) and in *Roebling* v. *Dillon*, 109 U.S. App. D.C. 402, 288 F.2d 386, *cert. denied*, 366 U.S. 918 (1961).

E. The Difficulty in Computing Plaintiff's Damages in This Case Has Been Caused by Defendant's Wrongful Conduct.

The testimony of the plaintiff and of the trustee established that the plaintiff's problems in securing compensation for his services flow from defendant's violation of the trusteeship agreement. Had the trustee been allowed to continue his endeavor to secure a most favorable settlement for the Swiss in accordance with the irrevocable provisions of the powers, plaintiff would have received his compensation from the trustee out of the proceeds of the settlement and the instant suit never would have been filed. The authorities are unanimous that a defendant whose wrongful conduct has rendered difficult the ascertainment of the pre-

cise damages suffered by the plaintiff is not entitled to complain that these damages cannot be measured with the same exactness and precision as would otherwise be possible. See, e.g., *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Hartley & Parker, Inc.* v. *Florida Beverage Corp.*, 307 F.2d 916 (5th Cir. 1962); *Stepovich* v. *Kupoff*, 261 F.2d 693 (9th Cir. 1958). The principle finds expression in the following statement by Judge Vann speaking for the Court in *Mooney* v. *Byrne*, 163 N.Y. 86, 57 N.E. 163, 165 (1900):

> "Guided by the cardinal principle that the wrongdoer shall make nothing from his wrong, equity so moulds and applies its plastic remedies as to force from him the most complete restitution which his wrongful act will permit".

Accordingly, it is submitted that the record as it now stands contains the best evidence as to the value of plaintiff's services and the Court should undertake to award the plaintiff such sum as it reasonably believes will compensate him for his exceptional and unusual services.

III

Alternatively, Plaintiff Requests the Court To Reopen the Judgment and To Permit Him To Adduce Certain Additional Testimony Which May Assist the Court in Placing a Value on His Services

While plaintiff believes that there is ample evidence in the trial record to enable the Court to assess the damages to which he is entitled, it may be that the Court will wish to hear certain additional testimony on the question of the value of plaintiff's services. Attached hereto as Exhibit "B" is the affidavit of Charles E. Wilson which would indicate certain additional matters as to which he could testify if afforded the opportunity to do so. Plaintiff expects to obtain expert testimony from the financial community in New York City bearing on this issue. Accordingly, if the

Court is not satisfied with the state of the record on the question of the value of plaintiff's services, plaintiff respectfully requests the Court to reopen the judgment to enable the plaintiff to adduce additional testimony by the trustee and by certain experts in the field of industry and finance.

[Exhibit excerpt from May 19, 1964 "Washington Merry-Go-Round" by Drew Pearson is omitted here. It is printed *supra* at the end of "Plaintiff's Motion for Reconsideration".]

Affidavit of Charles E. Wilson

STATE OF NEW YORK }
COUNTY OF WESTCHESTER } ss:

Personally appeared CHARLES E. WILSON, of 7 Hampton Road, Town of Scarsdale, WESTCHESTER COUNTY, NEW YORK, before me, who being first duly sworn, deposes and says that:

On May 23, 1960, I accepted all of the duties and imperative mandates to act as sole Trustee under Powers in Trust for SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., also known as INTERHANDEL.

I became Trustee under the Resolutions and Powers conferred upon me by the above INTERHANDEL, made part of one another, as ratified on April 28, 1960, at the office of UNION BANK of SWITZERLAND, ZURICH, SWITZERLAND, and which I accepted and acted upon, and which Resolutions coupled to my Powers expressed the intentions of the parties.

Thereunder, I was required by Interhandel to settle their action against the Attorney General of the United States, and solely to conclude any and all negotiations related to all of the property and business of Interhandel in the United States of America the subject matter of this action,

and to convey their property to American purchasers with clear title.

I was required to discharge all claims and all liens outstanding, and that would include the equitable lien of Robert A. Schmitz of which I had knowledge. With that knowledge, and in order to carry out my mandate also consistent with the added express oral understandings arrived at with Interhandel at Paris, France, on April 30, 1960, the fixation of fees including the fee of Mr. Robert A. Schmitz was in my sole discretion under my Powers in Trust.

Ever since that point in time it has been and remains my firm judgment that the reasonable value of the said services of Mr. Robert A. Schmitz was not less than five percent (5%) of the sums recovered by Interhandel under the settlement, and I would have paid Mr. Schmitz not less than five percent out of the sums recovered as part of my obligation.

Paragraphs 23 and 24 of the Resolutions part of my Powers are expressive of the intentions of Interhandel for me to effectively execute, and Paragraphs 2, 4, 5, and 6 of my specific Powers in Trust confirm by obligation.

Defendant's Memorandum in Opposition to Plaintiff's Motion for Reconsideration or, Alternatively, To Open the Judgment and Take Additional Testimony

This opposition is addressed to plaintiff's "Additional Points and Authorities," since it embraces all that was stated in plaintiff's motion.

The first two sections are but a reiteration of what plaintiff's counsel set forth in their proposed findings and as they argued orally to the Court. Authorities cited are either to the same effect as those earlier presented, or are inapposite to the facts of the case at bar.

These first two sections merely ask the Court to change its mind, and to overrule its carefully-considered opinion based upon the totality of the evidence. This is plainly an unreasonable request, since nothing new is presented.

A motion under Rule 59(a) R.F.Civ.P. must establish, according to Barron & Holtzoff *Federal Practice and Procedure,* (*Wright,* Rules Edition), Vol. 3, § 1303:

> "... manifest error of law or mistake of fact, and a judgment should not be set aside except for substantial reasons." (at pp. 356-357).

Plaintiff clearly is not meeting this test.

The third point—that the judgment be opened to permit plaintiff to adduce "certain additional testimony"—is not worthy of judicial consideration since on its face it is not even a serious effort to persuade the Court that evidence exists which the Court found was missing at the trial.

An affidavit by Mr. Charles Wilson is tendered and, in addition, *counsel* states that "[P]laintiff *expects to obtain* expert testimony from the financial community in New York City *bearing* on this issue [value of plaintiff's services]." (Underscoring supplied.)

Referring first to the latter statement, not made under oath but merely included in the "Points and Authorities," this *expectation* by plaintiff does not even take the trouble to tell the Court of what the "expert testimony" will consist. The most that is stated is that it will *bear upon* the value of plaintiff's services. Plaintiff has had about one month in which to develop such evidence—if in fact he could obtain it—and yet he fails to identify a witness or to describe the proposed testimony. Judgments would never be *final* if such representation could be the basis for re-opening a case.

Turning to Mr. Charles Wilson's affidavit, the relevant parts of it are an incredible document in the face of the

case which plaintiff undertook to prove at the trial. The relevant parts to which we refer are twofold, as follows:

(1) That the fixing of the amount of plaintiff's "fees" was in affiant's sole discretion.

(2) That it was affiant's "firm judgment" from April 30, 1960 "that the reasonable value of the *said services* . . . was not less than five percent (5%) of the sums recovered"; and that affiant would have paid plaintiff not less than 5%. (Underscoring supplied.)

Let us turn back to page 7 of the "Additional Points and Authorities" where, near the bottom of the page, the following appears:

> "Testimony was presented at trial that the trustee had been advised that plaintiff had an agreement with the Swiss whereby they would pay him 5% of the settlement (Tr. 1023) *sic* [1223] even though the trustee *did not then* recall where or under what circumstances the money was to be paid." (Underscoring supplied.)

Is the Wilson affidavit offered to support the existence of the newly discovered evidence? Hardly! Plaintiff does not use the term, but suggests that affiant did not recall at the trial that which he now swears to. But the affiant does not swear and could not truthfully swear that he did not recall, at the trial, that which he now states in his affidavit has always been clear in his mind.

We heard not one word at the trial that Mr. Wilson had the "sole discretion" to fix the amount of plaintiff's "fee." All of plaintiff's theories were contrary to such an idea. Moreover, according to the affidavit, it has *always* been affiant's "firm judgment" that the reasonable value of plaintiff's services was 5%. If this was *always* his firm judgment, it is not newly discovered, nor did he testify to that effect at the trial.

We are confronted with a newly "discovered" theory, not evidence!

The Court will also note that the affiant does not define "the said services," nor could he define plaintiff's services at the trial (See Tr. 1219-23). Were the services ones which encompassed October, 1959-May, 1960, or December, 1958-May, 1960, as mentioned on pages 4-5 of the "Additional Points and Authorities"; or for procuring affiant to act as "trustee"; or those rendered during the period June, 1960-December, 1961; or extending into 1962 until affiant resigned? The Court will recall that Mr. Wilson rejected out of hand, on cross-examination, that plaintiff's fee was tied merely to procuring affiant to undertake the "trusteeship," Tr. 1223-4. Thus, Mr. Wilson cannot be treating plaintiff's compensation as a finder's fee.

In the abandoned second count of his complaint, plaintiff fixed the reasonable value of his services up to December, 1961, at $150,000. True, this count was withdrawn, perhaps for tactical reasons, but it was a figure which he perpetuated throughout three successive complaints filed in this Court.

Now, Mr. Wilson swears for the first time that in his "firm judgment," which was formed on April 30, 1960, the reasonable value of plaintiff's "said services" was 5% of $145,000,000, or $7,250,000. We wonder whether Mr. Wilson realizes that for a maximum period extending from December, 1958 to November, 1962—about four years, he is allocating to plaintiff an annual income rate of $1,812,500, while during that same era a $200,000 annual salary for the President of Generl Electric Company would take over 36 years to aggregate $7,250,000.

Harsh words could be used to describe plaintiff's effort to reopen this case. Instead, defendant submits that the effort is frivolous, amounting to trifling not only with this Court, but with a "final judgment."

Judge Keech's remarks in *Rue* v. *Feuz Construction Co.* (1952) 103 F. Supp. 499, are particularly in point in the case at bar. We take the liberty to quote him *in extenso* from page 502, as follows:

> "As to ground 5: The principal contention of counsel for the garnishee is that the reopening of this case is within the discretion of the trial court, that such discretion should be exercised upon a substantial showing that an unjust and incorrect judgment is about to be entered, and that the three affidavits make such a showing.
>
> "There is nothing to indicate that any of the parties whose testimony the garnishee now seeks to present to the court were at the time of the trial in any wise incapable of appearing or beyond the reach of the garnishee. Indeed, the parties from whom additional evidence would be elicited are persons who are and have been readily available to the garnishee.
>
> "There is no contention—as there cannot be—that the additional evidence is newly discovered.
>
> "The garnishee's motion coming at this time and on the state of this record is, in effect, a motion for a new trial on the ground that an attorney who tries his case largely on one theory, without producing evidence then available to meet the other issues raised at the trial, should be permitted, after the court renders judgment against him, to reopen the case in order to put in his defense to those issues which at the trial he deemed unworthy of refutation.
>
> "[2-5] The court concedes that under Rule 59(a) the court has discretion to reopen a case on a motion for new trial for the taking of additional testimony. However, such discretion should be exercised only where the circumstances show justification for departure from the usual procedure. It is the view of this

court that failure of a party to call available witnesses to meet issues raised at the trial, does not constitute justification for reopening a case after determination by the court. Public policy and the court calendar are such as not to permit a party litigant to gamble on reliance on one theory at the trial and, after a contrary view of the evidence is adopted by the court and is to be followed in its judgment on the facts of record, to seek to reopen the case to meet the other issues raised by that record, in an attempt to make for a finding in its favor on the theory adopted by the court.

"As to counsel's argument that the court should exercise its discretion to reopen the case upon a substantial showing that an incorrect and unjust judgment is about to be entered, the affidavits now offered by the garnishee do not make a substantial showing that a different judgment would be rendered if the case were reopened for presentation of the facts contained in them."

The whole attempt here is specious, and should be so treated. Plaintiff's motion should be denied in its entirety.

Argument on Plaintiff's Motion for New Trial, etc.

[1747] Mr. O'Donoghue: May it please the Court, we are here to present oral argument on our Motion for a new trial or reconsideration of your Honor's findings and Order in this case.

Basically, your Honor's opinion is to the effect that you found no evidence of an expressed promise, that although you did find evidence of services performed and a basis for a claim in quaisi-contract (sic) or unjust enrichment, that you found no evidence of the value of those services.

The Court: May I interrupt you for a moment? Did I actually find unjust enrichment?

Mr. O'Donoghue: Well, I don't think you did, but you found a basis for quaisi-contract (sic) which I believe is, or which is sometimes quite usually considered the equivalent of unjust enrichment; and sometimes one term is used and sometimes another. I don't believe—

The Court: I don't have any recollection of having [1748] found the services rendered by Mr. Schmitz—

Mr. O'Donoghue: —quaisi— (sic)

The Court: (Continuing) —had any causal relation with the enrichment of Interhandel. Do I make that clear?

Mr. O'Donoghue: I see what you mean, that his services did not contribute to the result?

The Court: Not the result of

Mr. O'Donoghue: I don't know that your Honor found that they did not.

The Court: I think I did. I think that's a reasonable interpretation of it. I found he rendered a service, but I don't think I found those services contributed in any way to the settlement that was ultimately negotiated.

I'm sorry for interrupting you; it was simply to—

Mr. O'Donoghue: That's quite all right. I appreciate your Honor's doing it so that I can concentrate on what may be—

The Court: I shouldn't interrupt you.

Mr. O'Donoghue: No, that's quite all right. Don't feel any concern at all about that.

Let us call it a "quaisi-contract" (sic) that he performed services, for which it was presumed a promise to compensate him may have been made or presumption of it.

On the matter of the actual agreement for compensation, I won't attempt to reargue that to your Honor. I am [1749] convinced that there was adequate evidence that points to-

wards such an expressed promise. There is language in letters written by Dr. Schaefer to Mr. Schmitz in August of 1960, which as you will remember, is the summer of the first activity of the trusteeship, that promises had been made to him, both in Zurich and in Paris; and therefore, we believe that that is evidence that some promise of compensation was in fact made, which said that certain sums had been set aside for him. And I pointed out in our original argument that that could not possibly have any relation to the $2,000 a month that was begun in October of 1960 relating back only to the first of June of 1960 because the main services were performed before that time.

However, I would like to concentrate, therefore, on the question of whether or not there is any real need to prove the value of services, or the damages in detail, or specifically if there is evidence that there was a basis for recovery of any kind. And I believe your Honor has held that there was a basis for recovery, but that you could not award any amount because there was no evidence of that specific value.

Your Honor has cited a number of cases to this effect, and none, however, from the Federal Reports, none certainly from the District of Columbia and none from the Supreme Court.

[1750] In effect, your Honor has said that there must be specific proof of value of or of the amount of damages, even though damages have in fact been proved.

It seems to me that the case in the Supreme Court of Story Parchment Company versus Patterson Paper Company, which of course was cited in our Memorandum in support of our Motion for New Trial, is clearly to the effect that,

> "The rule which precludes the recovery of uncertain damages applies to such as are not the certain results of the wrong, not to those damages which are definitely attributable to the wrong, and only uncertain in respect of their amount."

And then it goes on to quote—this is the Supreme Court:

> "It is sometimes said that speculative damages cannot be recovered because the amount is uncertain; but such remarks will generally be found applicable to such damages as it is uncertain whether sustained at all from the breach. Sometimes the claim is rejected as being too remote. This is another mode of saying that it is uncertain whether such damages resulted necessarily and immediately from the breach complained of."

I won't read it all. Much that follows there is quite pertinent here. And it says that:

[1751] "Where, from the nature of the case, damages could not be measured with certainty by a fixed rule, all the facts and circumstances tending to show the probable amount of such damages should be submitted to the jury to enable them to form 'such reasonable and probable estimate as in the exercise of good sense and sound judgment they shall think would produce adequate compensation.'"

And it says that:

> ". . . We can see no objection in placing before the jury all the facts and circumstances of the case having any tendency to show damages or their probable amount, so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit."

In other words, the Supreme Court says that this matter as to speculation applies as to whether or not any damages exist, but that speculation within limits is clearly permitted as to the amount of the damages.

Now, your Honor has cited in your opinion cases about speculation which are just of that kind initially, that is to

say that cases like a man falling off of a train and being injured, and the Court said, "Well, we can't allow speculation as to whether or not there was negligence. That's not something [1752] that can be speculated on. There must be proof of actual negligence. There is no presumption of it. That is clearly consistent with the idea that if negligence was in fact proved, then damages should be ascertained by the best indicia available."

Now, our Court of Appeals has followed this notion in the case of *Espailit against the Berlitz School of Languages of America, Incorporated,* in 127 US Ap. DC, at 293. That was a case that was tried in the Municipal Court, and then went to the Municipal Court of Appeals. It was based on the theory that the plaintiff was fraudulently induced to accept a job as a translater (sic) at the Berlitz School, when they well knew that the job that they had for her required that she be a United States citizen because it was work with the Army, and that they therefore discharged her when the army said, "We can no longer employ you." And, so, the question then was, "Well, what are the damages?"

There were various theories of the damage, but the Municipal Court of Appeals said the award must have been made on sheer speculation because it was submitted to the jury and the jury awarded her damages, but the trial judge granted a verdict N.O.V. and that was sustained by the Municipal Court of Appeals. But the United States Court of Appeals said that "such treatment is improper in a case of [1753] personal services. It said,

> "It might be appropriate where it involves the sale or exchange of property, real or personal. It is our view, however, that a measurement merely in terms of the value of real or personal property sold or exchanged fails of applicability in the requisite 'flexible manner' when a contract for personal services has been induced by fraud."

It makes no difference that that was induced by fraud here because the Court of Appeals said the only question we are considering is the amount of damages, or whether the damages were speculative or not. So, whether the damages were induced by fraud or whether a breach of contract, is of no significance on this score.

The Court then said that the various items of damages, the various elements that go to make up the question, that go to determine the question can be submitted to the jury for their best consideration, and it spoke about the type of instructions that might be given in the case:

> "The jury will be instructed to ascertain the value of the contract to the appellant. The trial judge will charge that the jury's determination will not necessarily be based upon the amount of the promised salary, but the jurors will be free to consider as some [1754] evidence of that value that the parties themselves had agreed the Appellant was to receive $600. per month. As some measure of what the Appellee deemed the contract to be worth, the jury will consider additionally the value of the Appellant's services. Among other factors susceptible of proof, the jury may take into account the Appellant's qualifications for the undertaking in question and her earning power in various capacities reasonably related to the nature of the services the Appellee intended she should render over the contemplated life of the contract."

Then, it goes on to say:

> "All the other factors that would illuminate this question of what the damages might be . . . ."

that in a case where the measure of damages is a very difficult one—and there it was not difficult as compared with this case—that you cannot except that the usual proof of the value of services or the amount of damages is available, that all the various elements have to then be taken into consideration.

Now, in this case, it seems perfectly clear that the word "unique" is applicable. I don't think we can find any case where services were performed by anyone in identical or even similar circumstances. The services performed by Mr. Schmitz were so unusual as not to be readily fitted into any category to determine their actual value. But, [1755] nevertheless, I believe that we introduced a great deal of evidence such as the Supreme Court or our Court of Appeals would think would be relevant, if not precisely, by statement of someone saying, "The value of the services is such-and-such, that such a result justifies this percentage of compensation, or such-and-such an hourly rate is applicable here." This is not the kind of case that lends itself to that sort of thing.

It is the result that is produced whether it is easy or difficult. It is like, in some respects, like a real estate broker or some other kind of broker: He may, with great ease, produce a result that is extremely valuable to his client, and if so, he is entitled to substantial compensation for that, just as an attorney may make a claim for services, let us say, when he has accomplished a result. It may be after an extended trial and multiple appeals, or it may be that he convinces the defendant without the necessity of even filing suit that his client should be compensated in some substantial way.

Well, under those circumstances, it is the result that counts; and a judge or a jury should, taking all those elements into consideration—the result, the effort expended, and so forth—come up with some figure that compensates that plaintiff, that person performing the services for the services that he has in fact performed.

[1756] The Court: Let me interrupt you: What do you say is the result of the services which were accomplished by Mr. Schmitz?

Mr. O'Donoghue: Well, I say this—of course, perhaps your Honor disagrees with this—that he developed a concept, a theory, an approach to this "ball of wax," "can of

worms'' decision that had gone on unresolved for at least twelve or thirteen years; and he proposed a concept that appealed to the Swiss who were the ones concerned here. They accepted it; they adopted it; they utilized it; they took advantage of it, and I say that it clearly produced the result that Mr. Schaefer did not walk into the Attorney General's Office, off the street, as he would have us believe, and say, ''What will you take by way of settlement of this case,'' and that the fifty percent proposal was then made, without the hard work that was performed by Mr. Schmitz, Mr. Wilson and Mr. Spofford to bring that result about.

Now, I say also that some of the things that he accomplished, simply by getting the services of Mr. Wilson, that that increased the value of the stock of Interhandel by some 55 or 60 million dollars. It immediately jumped up to that and was maintained at approximately that value during the entire period of the trusteeship; and it was also the amount for which the settlement was finally made, with remarkably close per-share value of the stock that the bourse [1757] assessed it at by obtaining the services of Mr. Wilson. And I say, when he has accomplished a result of that kind, that the reasonable thing to do is to compensate him in an appropriate portion of that.

I think it is up to the Court to determine what that appropriate proportion is, considering that if either were an attorney, let us say, who produced a result of that kind, one-third would not be considered unreasonable so why would 5 percent, which is what there is certain evidence that, first if (sic) all, Mr. Schmitz said he was promised. There was the evidence from Dr. Sturzenegger when he was asked, didn't he promise something of that kind, or 2 or 3 percent? He said, ''I don't know. I may have said 2 or 3 percent'' or language of that kind, at least, so that there is evidence of that kind showing that values, appropriate values can be put on it.

Additionally, these are all just, let us say lines which interject somewhere and reach that result, which should be

achieved by the Court, that is to say, the work he did for United States companies with the idea of selling the GAF stock to an American Company. We saw that in one instance, he was promised $175,000 plus 10 percent of the stock that would be financed for him without any cost to himself, which would have been a very large amount, much more than he is asking for here. All of those things go [1758] to show the value, and it is the value to the Swiss that counts. It's what has been delivered to them, just as an attorney accomplishing results for his client, it's not how many hours he spends or anything like that; it is what results he got.

This situation, of course, was different in that he was not trying to work out a deal between an American company and the Swiss owners of the stock; it really went much farther than that. It was some plan and concept which ultimately was successful, that got back for them the stock itself, or half the value of it, and that was the result of their mission by Mr. Wilson and Mr. Spofford that enlightened the United States Government.

And I must say, I saw no basis for your Honor's conclusions that Mr. Wilson found that after the Democrats were elected in November of 1960, that there was no point in pursuing the matter any further with the Republican Administration because his very testimony is, that's when he did pursue it most thoroughly; and the Republican Administration was anxious to reach some conclusion before it left office.

And then, the conclusion that nothing more was done until the next summer when some slight effort was made: The fact of the matter is that during that period, contacts were made with the incoming administration, and that very [1759] brief known as "The Trustee's Memorandum" which if your Honor read it, I'm sure you would find extremely convincing as to the merits of the Swiss position. I am convinced that that, delivered as it was, to the Assistant Attorney General, was largely instrumental in facilitating this ultimate disposition of the case; so I say it was

this concept, these various activities that were performed by Mr. Schmitz, and if they did not in fact ultimately result, it was only by reason of the Swiss' own action, by their violation of the contract that had been so carefully drawn by Mr. Schmitz himself, and entered into by the Swiss, to the effect that the powers to the trustee were irrevocable, their revocation of those—attempted revocation; and I say they were not revoked until rescinded—that it was during that period that those powers were fully in effect that this basic agreement was entered into, and that this was a contract to which Mr. Schmitz was a third-party beneficiary, as it were; that it would give the irrevocable power to Charles Wilson to settle this matter and to settle all claims arising out of this, including those claims of Mr. Schmitz himself.

To repudiate that and to say, then, that Mr. Schmitz has no right to make the claim seems to me, well, reprehensible on the part of the Swiss, and I think it is something—an injustice that should be righted by this Court.

[1760] I don't know that this should be necessary. As I say, I think all the evidence is in there which enables the Court not to speculate, but to consider all factors and reach a reasonable amount that would compensate this man, so that the defendant who breached this contract would not be able to take advantage, as the Supreme Court says, of the difficulties of determining the value of the services; but that should not be something that enures to their benefit but on the contrary, that if it is difficult, the consideration should be against them rather than in their favor, and that the plaintiff should have the advantage, whatever it is, and the difficulties of ascertaining the value of the services, that in molding a result, or, as one of the courts has said, "to use the processes of equity to get a just result," those things should be taken into consideration.

Alternatively, we suggest that if your Honor has not been satisfied of the evidence which I feel your Honor should have been satisfied with, of the value of the services of Mr.

Schmitz, that you permit the case to be reopened pursuant to Rule 59 and evidence offered as to that value.

We are not prepared at the moment to go ahead with such proof, but we have made inquiries which lead us to believe that we could get excellently qualified, expert witnesses who could testify with some difficulty, because [1761] they recognize the uniqueness of these services, and that they don't fit into any of the ordinary categories; that we have been in contact with at least two other qualified experts in addition to Mr. Charles Wilson whom I believe should be permitted to testify as to his view, from his intimate knowledge of the value of the services of Mr. Schmitz.

And if your Honor is not satisfied that you can reach a conclusion as to the value of these services from what is already in evidence—which, in my opinion, should be enough—then, in justice you should permit us to—you should reopen the case to permit us to offer testimony on this point so that you can determine the value of these services under the circumstances. And if, therefore, you are not satisfied with what you have presently available, I ask that you act to reopen for that purpose. Thank you.

The Court: Mr. Wilson.

Mr. Wilson: I don't think I have anything to say in addition to that. We are confident as to the first two points that your Honor came to grips with, with the law as it is. Mr. O'Donoghue has not offered you anything in the way of citations that I think changes the reasoning that your Honor gave.

The interesting thing is that as I listened to him at the concluding argument of the trial, and I listened to him [1762] today, he still doesn't want to suggest a figure to your Honor. He wants to turn you loose with the facts and say to you, to come up with a figure. But an advocate for a plaintiff should at least have suggested a figure which he thinks your Honor would be justified in finding, and he is, for some reason, avoiding that in its entirety.

With respect to the third point of reopening the case, I think we "come to grips" with that. Mr. Wilson's affidavit

is of no value in this situation for the reasons we have pointed out; and the suggestion made at the time the motion was filed that they were looking for other evidence bearing on this point, and updated today with the information today that they still don't know what these witnesses are going to testify to—I think Judge Keech "came to grips" with this in the cases we cited to your Honor and reported to him on, and I would be taking your Honor's time to repeat his rulings. I think it's sound.

In your Honor's discretion, on Point 3, you should, of course, not reopen the case.

On Points 1 and 2, there has been nothing said here which disturbs your viewpoint on the law as you announced it once before.

The Court: Do you want to say anything further, Mr. O'Donoghue?

[1763] Mr. O'Donoghue: Only this, your Honor, that we did suggest in our Proposed Findings various bases and amounts that would be appropriate here. We suggested 5 percent of $340 million or 5 percent of 75 percent of that, or alternatively, 5 percent of $120 million, all of which are based on recovery, or potential recovery, on the part of the Swiss.

We have suggested those figures, and we do say that, if necessary—I mean, yes, if necessary, or if permitted, we will produce witnesses who can testify generally to that effect.

The Court: Let me ask you this question: That all proceeds on the assumption that you feel that the services rendered by Mr. Schmitz—and correct me if I am wrong—services rendered by Mr. Schmitz accomplished this result, the settlement which was ultimately carried out?

Mr. O'Donoghue: I don't think they would necessarily have to do with that, but—

The Court: Don't you, in every instance, use your percentage figure as a percentage of the settlement?

Mr. O'Donoghue: Yes.

The Court: —or of some other settlement which would have been larger than that ultimately accomplished?

Mr. O'Donoghue: That's right.

The Court: Haven't I found Mr. Schmitz did not [1764] accomplish that?

Mr. O'Donoghue: Well, let us suppose, your Honor has done that. You have certainly stated it today.

The Court: I think I did in my Memorandum.

Mr. O'Donoghue: Maybe you did. I can't say—then.

The Court: So, we do have a situation, if I may interrupt you, we do have a situation where for a period of time between the time that Mr. Schmitz went to work on this project and the time Mr. Wilson was appointed, accepted the trusteeship, Mr. Schmitz rendered some services.

Have you offered any evidence as to the value of those services?

Mr. O'Donoghue: No, we have not, because we consider that they were related to the result. But I think, your Honor could arrive at the values of that on the basis of what he was paid by other companies, what he requested to be paid for his interim services, not the amount he was actually paid, which was understood to be more or less for a retainer. We have not presented evidence on that because we believe the whole thing was so intimately tied together as to not to be capable of divorcement. But your Honor knows that he did work in the interest of the Swiss for a long period of time, part of that time without any [1765] compensation at all and part of that time for a very minimum amount of compensation.

The Court: Of course, as to that second part you specially waived. You waived the Second Count of the Complaint which related to that second period of service, did you not?

Mr. O'Donoghue: No, I don't think we did. We just said we didn't put a definite—

The Court: I didn't understand you are proceeding on the Second Count. Am I wrong on that?

Mr. O'Donoghue: We are not proceeding on the Second Count, but we are proceeding on quantum meruit.

The Court: But you were proceeding on this second period starting June 1, 1960?

Mr. O'Donoghue: We are not proceeding on that, but on the actual amount of money that—

The Court: As I remember it, the Second Count made a claim, was it for $150,000?

Mr. O'Donoghue: Yes. Credit for $38,000.

The Court: Credit for what had been paid, but you did not offer any evidence at trial in support of that?

Mr. O'Donoghue: No, your Honor, we didn't because we withdrew that count and proceeded simply—

The Court: That's the point I am trying to make.

Mr. O'Donoghue: We proceeded simply on a *quantum meruit*, but for that period as well.

Order

After the court entered judgment for the defendant pursuant to its Findings of Fact and Conclusions of Law, plaintiff filed a Motion for Reconsideration or, Alternatively, to Open the Judgment and Take Additional Testimony.

After thorough consideration of plaintiff's Points and Authorities, and after oral argument, the court is of the opinion that plaintiff has failed to demonstrate either manifest error of fact or law or to establish any other facts which entitle plaintiff to a complete or partial new trial.

Therefore, it is

ORDERED that plaintiff's Motion for Reconsideration or, Alternatively, to Open the Judgment and Take Additional Testimony, be and hereby is, denied.

JUDGE MCGARRAGHY
Judge

June 30, 1970